

Exhibit 146

United States of America ex rel. Ven-a-Care of the Florida Keys, Inc. v. Boehringer Ingelheim Corp. et al.

Civil Action No. 07-10248-PBS

Exhibit to the July 24, 2009, Declaration of James J. Fauci
In Support of Plaintiff's Motion for Partial Summary Judgment and
In Opposition to the Roxane Defendants' Motion For Partial Summary Judgment

Gaston, Sue - March 19, 2008 09:00:00 a.m.

287:1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS
3 - - - - -
4 IN RE: PHARMACEUTICAL) MDL NO. 1456
5 INDUSTRY AVERAGE WHOLESALE) CIVIL ACTION
6 PRICE LITIGATION) 01-CV-12257-PBS
7 THIS DOCUMENT RELATES TO)
8 U.S. ex rel. Ven-a-Care of) Judge Patti B. Saris
9 the Florida Keys, Inc.)
10 v.) Chief Magistrate
11 Abbott Laboratories, Inc.,) Judge Marianne B.
12 No. 06-CV-11337-PBS) Bowler
13 - - - - -
14 (cross captions appear on following pages)
15
16 Videotaped deposition of SUE GASTON
17
18 Volume II
19
20 Washington, D.C.
21 Wednesday, March 19, 2008
22 9:00 a.m.

Gaston, Sue - March 19, 2008 09:00:00 a.m.

288:1 UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MASSACHUSETTS

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4 IN RE: PHARMACEUTICAL) MDL NO. 1456

5 INDUSTRY AVERAGE WHOLESALE) CIVIL ACTION

6 PRICE LITIGATION) 01-CV-12257-PBS

7) Judge Patti B. Saris

8 THIS DOCUMENT RELATES TO) Chief Magistrate

9 ALL CASES IN MDL NO. 1456) Judge Marianne B.

10 - - - - - Bowler

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13 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

14 THIRD JUDICIAL DISTRICT AT ANCHORAGE

15 - - - - -

16 STATE OF ALASKA,)

17 Plaintiff,)

18 vs.) Case No.

19 ALPHARMA BRANDED PRODUCTS) 3AN-06-12026 CI

20 DIVISION, INC., et al.)

21 Defendants.)

22 - - - - -

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322:1 what type of drugs and the criteria basically was
2 drugs that were considered outpatient drugs,
3 generally dispensed at the pharmacy level.

4 Q. And we talked about this last time.
5 But you were aware that you specifically took
6 steps to exclude infusion and injectable drugs
7 from the mechanism by which the FULs were
8 calculated, correct?

9 MS. MARTINEZ: Objection, form.

10 A. Correct.

11 Q. Do you recall any discussions about
12 perhaps changing the HCFA policy or criteria not
13 to establish FULs for injectable and infusion
14 drugs at any point in time?

15 A. I know that the conversation was
16 probably discussed. I don't know when. But no
17 steps were taken to do that.

18 Q. Can you tell me why not steps were
19 taken to do that?

20 A. It's my understanding that the criteria
21 we were using is to set federal upper limit
22 prices on drugs that were most commonly used.

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323:1 When we stepped into the arena of injectable
2 drugs or other drugs that weren't most commonly
3 used, I think it was a little more difficult to
4 capture those drugs for various reasons. So
5 that's why we stuck with the basic criteria that
6 we used.

7 Q. But you believe that there were
8 discussions about possibly moving injectable
9 infusion drugs into the FUL program; is that fair
10 to say?

11 A. I wouldn't say that specifically.
12 There could have been conversations. I wouldn't
13 say that the conversations went as far as to say
14 let's move them into the FUL arena. But the
15 conversations were there. And I can only answer
16 that generally, because I only remember short
17 conversations maybe discussing the issue.

18 Q. If there has been testimony from Mr.
19 Bentley that he -- his best recollection is that
20 he advised you of the large differences between
21 acquisition cost and AWP's for certain injectable
22 infusion drugs at least as early as 1990, could

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456:1 Q. And Ms. Bergin's note indicates that in
2 this instance CMS did not set a FUL because the
3 FUL price would have been equal to Major's AWP;
4 is that correct?

5 A. Correct.

6 Q. Are you familiar with making that kind
7 of a decision not to set a FUL when it was equal
8 to an AWP?

9 A. Yes.

10 Q. Why would CMS decline to set a FUL when
11 the FUL was equal to an AWP?

12 A. Because states have other methodologies
13 they can use for reimbursement. And their
14 regular reimbursement methodology would be a
15 percentage off of AWP. That would be a
16 reasonable reimbursement rate for other drugs.
17 So the purpose of setting the FUL price is to try
18 to set reasonable reimbursement. And that would
19 kind of counter what the states were doing with
20 their other reimbursement methodology.

21 Q. I see. So just like we talked about
22 there morning, one of the objectives of the FUL

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457:1 program is cost savings?

2 A. Correct.

3 Q. And so if you set a FUL that was equal
4 to an AWP it wouldn't really result in any cost
5 savings to the state?

6 A. Correct.

7 Q. And so in this case, if I understand
8 what's going on here with cefadroxil in 2001,
9 basing a FUL on the lowest published price seemed
10 to result in a FUL that was too low, right?

11 A. It appeared that way because of the
12 compendia information that we have.

13 Q. And setting a FUL -- not using that
14 lowest published price but moving up to the next
15 seemed to result in a FUL that was too high?

16 A. Correct.

17 Q. And so CMS declined to set a FUL given
18 the published prices that were out there?

19 A. Correct.

20 Q. Let me just digress here for a second.
21 What role if any did AWP play in setting FULs?

22 A. Generally, it did not.

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528:1 Q. Would you have had access to that AMP
2 information?

3 A. Yes.

4 Q. Did you ever use that AMP information
5 in setting FULs?

6 A. No.

7 Q. Did you ever use that AMP information
8 in terms of evaluating and the approval of state
9 Medicaid plans?

10 A. State Medicaid plans are for the
11 states. So we really wouldn't use AMPs.

12 Q. Well, as I understand it, one of your
13 responsibilities -- one of your other
14 responsibilities was approving state Medicaid
15 plans, right?

16 A. Correct.

17 Q. And to get approval, one of the things
18 a state had to demonstrate was the reasonableness
19 of its reimbursement rates?

20 A. Correct. Their methodology.

21 Q. Their methodology.

22 A. Correct.

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529:1 Q. And I guess what I'm wondering is in
2 examining the reasonableness of the methodology,
3 the reasonableness of the reimbursement rates the
4 state was proposing to pay, if you ever looked at
5 AMP information.

6 A. No.

7 Q. Switching back to putting your FUL hat
8 back on, what if anything did CMS do to monitor
9 when drugs were coming off patents and therefore
10 going generic?

11 A. Well, when I was doing the FUL program
12 basically I just waited to get notification if
13 somebody would let me know. I really didn't do
14 anything proactively, because I just didn't have
15 the capability of doing it or the time.

16 Q. Is it different today? Do you know?

17 A. I don't know.

18 Q. And who typically will let you know
19 that something came off patent and therefore went
20 generic?

21 A. Industry folks. I can't say
22 specifically. But sometimes pharmacies might